SANTO V DAVID

Federal Court of Australia (Logan J)
5 February 2010
[2010] FCA 42

Native Title – application by Torres Strait Island People seeking declaratory and injunctive relief – prior determination by the Court under the *Native Title Act 1993* (Cth) – allegation of an invalid act affecting native title due to the construction of a building on the subject land – prescribed body corporate holding interests on trust – standing to bring application

Facts:

The Applicants, Pancho Santo and Cyril Santo, claim membership of the Erubam Le people that inhabit Erub (Darnley Island) in the Torres Strait. The Applicants claim that the land on Erub known as 'Zaum' or 'Zaum Keriem' is traditionally owned and occupied by members of the Santo-Sam family.

The Applicants claimed that a dwelling had been constructed on this land without their permission, and sought orders for its removal by the Respondent, Ms Annie David. They also sought that the land be restored to its state prior to the construction of that dwelling. Due to its alleged approval of the dwelling, the Torres Strait Regional Authority was initially a respondent to these proceedings, but was subsequently removed. The remaining Respondent did not take any part in the proceedings. The Applicants accepted that the land known as Zaum formed part of the native title determination made by the Federal Court in *Mye on behalf of the Erubam Le v State of Queensland* [2004] FCA 1573. This determination was made under s 87 of the *Native Title Act 1993* (Cth) ('*NTA*') and the Santo family is recorded in the determination as being part of the Erubam Le people.

The preliminary question the Federal Court had to determine was whether the applicants had standing to seek declaratory and injunctive relief.

Held, dismissing the application due to a lack of jurisdiction and standing:

1. In orders for the applicants to claim the relief sought it would have to be proven that: at the time of British Sovereignty a body of traditional laws existed that had provision for the ownership or enjoyment of rights in respect of land by an individual or a particular family, as opposed to communally; under those laws and customs, the Applicants or their family would have to be considered the traditional owners of the land in question, to the exclusion of all others; the connection to the land was uninterrupted; and there must not have been an inconsistent state act of that land: [26].

2. The native title determination made by the Federal Court is an 'approved determination' under s 13 of the *NTA*. Section 68 of the *NTA* provides that the court cannot conduct any proceedings in relation to an approved determination unless it is an application to revoke, vary, review or appeal the first determination, none of which the Applicants are seeking: [31]–[32]; *Mye on behalf of the Erubam Le v State of Queensland* [2004] FCA 1573, cited.

3. Section 61A(1) of the *NTA* provides that an application must not be made in relation to an area for which there is an approved determination of native title. This is because there is an absence of jurisdiction to entertain such an application: [33]–[34].

4. The native title that the Federal Court has determined to exist is communal, not individual in character. It is held by the members of the claim group called the Erubam Le.

The prescribed body corporate, Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation ('the Corporation'), holds the native title in trust for such persons: [25], [35]; *Mye on behalf of the Erubam Le v State of Queensland* [2004] FCA 1573, applied.

5. While the Corporation has standing to bring proceedings for declaratory and injunctive relief, the Applicants do not. Such proceedings fall within the functions consigned to a prescribed body corporate by regulation 6 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), which are regulations for the purpose of s 56(3) of the *NTA*. Section 56(3) leaves no direct, residual or individual role for the Applicants in relation to such litigation: [37]–[38].

6. It is accepted that the term 'trust' is not a term of art in public law. This does not alter the comprehensive managerial function consigned to a prescribed body corporate in relation to the determined native title rights and interests. Nor is it inconsistent with those rights and interests being held 'in trust': [21], [39]; *Town Investments Ltd v Department of the Environment* [1978] AC 359, cited; *Bathurst City Council v PWC Properties Pty Limited* (1998) 195 CLR 566, cited.

7. Section 211 of the *NTA* does not give an enduring role to the Applicants as individuals to institute such proceedings. The reference in s 211(2) to the 'native title holders' means no more than where that 'native title holder' as defined is a prescribed body corporate, those on whose behalf the native title is held in trust by that body corporate are not prohibited: [40].

8. The *NTA* does not leave some residual, common law role for the Applicants to seek the relief specified in the application: [38], [41].